



BRB Nos. 15-0216 BLA  
and 15-0218 BLA

MARIE HOWELL	)	
(o/b/o and Widow of LESLIE HOWELL)	)	
	)	
Claimant-Petitioner	)	
Respondent	)	
	)	
v.	)	
	)	
LODESTAR ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL	)	DATE ISSUED: 03/24/2016
INSURANCE	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits in a Miner's Claim on Remand, and the Decision and Order Awarding Benefits in a Survivor's Claim, of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Marie Howell, Harold, Kentucky, *pro se*.

Stanley S. Dawson (Fulton & Devlin), Louisville, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits in a Miner's Claim on Remand (2004-BLA-06791), and employer/carrier (employer) appeals the Decision and Order Awarding Benefits in a Survivor's Claim (2012-BLA-05919), of Administrative Law Judge Joseph E. Kane, rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The Board has consolidated the appeals for purposes of decision only. The miner's claim is before the Board for the second time.<sup>1</sup>

In the initial Decision and Order on the miner's claim, Administrative Law Judge Janice K. Bullard credited the miner with twenty-nine years of coal mine employment<sup>2</sup> but found that the miner did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Therefore, Judge Bullard denied benefits. Upon review of the miner's appeal, the Board held that Judge Bullard erred by issuing a decision without holding the requested hearing. *L.H. [Howell] v. Lodestar Energy, Inc.*, BRB No. 07-0946 BLA (Aug. 22, 2008) (unpub.). Accordingly, the Board vacated the denial of benefits and remanded the case for further proceedings. *Id.*

After the Board's remand to the Office of Administrative Law Judges (OALJ), the miner's claim was remanded to the district director for the miner to receive a complete pulmonary evaluation. The district director returned the miner's claim to the OALJ for adjudication, following the completion of the pulmonary evaluation. Director's Exhibit 37. After the miner's death on December 10, 2010, his claim was remanded to the district director to be consolidated with the survivor's claim. On remand, the district director held the miner's claim in abeyance until a decision could be issued in the survivor's claim. Director's Exhibit 40 at 36. On May 11, 2012, the district director issued a Proposed Decision and Order awarding benefits in the survivor's claim only and,

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<sup>1</sup> The miner filed his claim on March 26, 2003. Director's Exhibit 2. The miner died on December 10, 2010, while his claim was pending before the Office of Administrative Law Judges. Director's Exhibit 50. Claimant filed her survivor's claim on September 12, 2011, and is pursuing the miner's claim. Director's Exhibit 42.

<sup>2</sup> The miner's most recent coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

at employer's request, forwarded both claims to the OALJ for a hearing, which was held on June 5, 2013. Director's Exhibits 74, 77, 78.

In a Decision and Order issued on February 24, 2015, Administrative Law Judge Joseph E. Kane (the administrative law judge) addressed the miner's claim and, after crediting the miner with twenty-nine years of coal mine employment, found that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Therefore, the administrative law judge determined that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2012). Next, the administrative law judge found that the autopsy evidence established that the miner had clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), but that the medical opinion evidence did not establish that the miner had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the miner's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and determined that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, however, found that the evidence failed to establish that pneumoconiosis was a substantially contributing cause of the miner's total disability, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits in the miner's claim.

In a separate Decision and Order issued on February 24, 2015, the administrative law judge addressed the survivor's claim. The administrative law judge credited the miner with twenty-nine years of underground coal mine employment and found that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),<sup>3</sup> that the miner's death was due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal in the miner's claim, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging the Board to affirm the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director),

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<sup>3</sup> If a miner had fifteen or more years of underground or substantially similar coal mine employment, and had a totally disabling respiratory or pulmonary impairment at the time of his or her death, Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

declined to file a substantive response. On appeal in the survivor's claim, employer argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, or by proving that no part of the miner's death was caused by pneumoconiosis. Neither claimant, nor the Director, has filed a response.<sup>4</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

### **Claimant's *Pro Se* Appeal of the Denial of the Miner's Claim**

To establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling.<sup>5</sup> 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner was

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<sup>4</sup> We affirm, as unchallenged on appeal in these claims, the administrative law judge's findings that the miner had twenty-nine years of underground coal mine employment, and that he had a totally disabling respiratory or pulmonary impairment. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Miner's Claim Decision and Order at 3, 25-27; Survivor's Claim Decision and Order at 4, 16-18. We further affirm the unchallenged findings in the miner's claim that the miner had clinical pneumoconiosis that arose out of his coal mine employment. See *Skrack*, 6 BLR at 1-711; Miner's Claim Decision and Order at 17-25. We also affirm the unchallenged finding in the survivor's claim that claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. See *Skrack*, 6 BLR at 1-711; Survivor's Claim Decision and Order at 16-23.

<sup>5</sup> The Section 411(c)(4) presumption of total disability due to pneumoconiosis applies only to claims filed after January 1, 2005, that were pending on or after March 23, 2010. 20 C.F.R. §718.305(a). Therefore, it is unavailable to claimant in the miner's claim, which was filed in 2003.

totally disabled due to pneumoconiosis if the miner was suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yielded one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yielded massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether the claimant has invoked the irrebuttable presumption pursuant to 20 C.F.R. §718.304. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge accurately noted that neither the chest x-ray evidence pursuant to 20 C.F.R. §718.304(a), nor the medical opinion and CT scan evidence pursuant to 20 C.F.R. §718.304(c), supported a finding of complicated pneumoconiosis. The record reflects that no x-ray interpretation identified large opacities, no physician diagnosed complicated pneumoconiosis, and although two CT scans from the miner's treatment records identified large masses in the miner's right lung, the physicians who interpreted those scans concluded that the masses likely represented carcinoma. Director's Exhibit 12 at 1, 14, 17-18; Director's Exhibit 14 at 3-4, 13; Director's Exhibit 36 at 10, 13-14, 26-28, 260-62, 280, 287; Director's Exhibit 40 at 151, 164, 241, 404-05; Claimant's Exhibits 1, 2, 3; Miner's Claim Decision and Order at 8-9, 20-24. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's determination that the evidence did not support a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) or (c).

The administrative law judge also considered the biopsy<sup>6</sup> and autopsy evidence pursuant to 20 C.F.R. §718.304(b). Dr. Dennis, who performed the autopsy on the miner, reviewed ten sections of the miner's lungs and concluded that the miner had "[c]omorbidities of progressive massive fibrosis and tumor."<sup>7</sup> Director's Exhibit 51 at 4.

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<sup>6</sup> The administrative law judge accurately noted that the biopsy evidence in the miner's treatment records did not contain a diagnosis of pneumoconiosis. Director's Exhibit 40 at 133-35.

<sup>7</sup> Because Dr. Dennis's license to practice medicine in Kentucky was suspended in August of 2012, and Dr. Dennis surrendered his license in January of 2013, employer objected to the admission of his autopsy report, which was prepared in December of 2010. Hearing Transcript at 11-13. Employer also argued in its closing brief below that the administrative law judge should discredit Dr. Dennis's report "because he lost the ability to practice medicine for disciplinary reasons shortly after rendering his opinions."

He also diagnosed “[a]denocarcinoma, either primary or metastatic to the lung with comorbidities of progressive massive fibrosis and coal workers['] pneumoconiosis along with emphysema and moderate degrees of tumor present.” *Id.* Employer submitted the report of Dr. Caffrey, who concluded that the miner had simple pneumoconiosis, but disagreed with Dr. Dennis’s diagnosis of progressive massive fibrosis. Director’s Exhibit 52 at 5. In Dr. Caffrey’s view, Dr. Dennis’s report did not include a gross or microscopic description of a lesion of progressive massive fibrosis, and Dr. Caffrey stated that he did not see microscopic characteristics of such a lesion in his review of the autopsy slides. *Id.* at 5-6.

The administrative law judge noted that a diagnosis of progressive massive fibrosis may equate to “massive lesions” under 20 C.F.R. §718.304(b). *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 3 BLR 2-36, 2-38 (1976) (“Complicated pneumoconiosis . . . involves progressive massive fibrosis as a complex reaction to dust and other factors . . .”); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384 (4th Cir. 2006). The administrative law judge, however, did not resolve the conflicting opinions of Drs. Dennis and Caffrey as to whether progressive massive fibrosis was present. Instead, the administrative law judge found that Dr. Dennis’s autopsy diagnosis of progressive massive fibrosis did not meet the requirements of 20 C.F.R. §718.304 because Dr. Dennis did not identify lesions “comprised solely of pneumoconiosis.” Miner’s Claim Decision and Order at 20.

In so finding, the administrative law judge cited an unpublished decision by the Board, in which the Board accepted the Director’s position that establishing the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 requires that lung lesions be produced by a “chronic dust disease of the lung” through “a natural process.” *M.G. [Gollie] v. Elkay Mining Co.*, BRB No. 07-0375 BLA, slip op. at 7 (Jan. 31, 2008) (unpub.). Based on that decision, the administrative law judge ruled that “a lesion containing a mixture of pneumoconiosis and cancer does not satisfy the requirements at 20 C.F.R. § 718.304.” Miner’s Claim Decision and Order at 20. Because Dr. Dennis

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Employer’s Closing Argument at 7. The administrative law judge acknowledged that Dr. Dennis lost his license for “unethical conduct,” but rejected employer’s arguments regarding the admission and credibility of the report because they “do not bear on Dr. Dennis’ knowledge, skill, experience, training, or education in pathology,” and because “the events giving rise to Dr. Dennis’ suspension occurred after he authored the autopsy report in this case. . . .” Miner’s Claim Decision and Order at 6 n.12. Employer has not challenged those determinations on appeal, and we therefore affirm them. *See Skrack*, 6 BLR at 1-711.

diagnosed “comorbidities” of progressive massive fibrosis and cancer, the administrative law judge found that the miner’s lung lesions could not constitute massive lesions:

Even after reviewing each microscopic description Dr. Dennis provided in his autopsy report, I find that none supports a finding of massive lesions *comprised solely* of pneumoconiosis. Because Dr. Dennis identified the simultaneous presence of a tumor and progressive massive fibrosis, and of cancer and progressive massive fibrosis, I cannot conclude that the lesions he identified on the Miner’s autopsy are *comprised solely* of anthracotic or pneumoconiotic material. Thus, the Claimant is unable to invoke the irrebuttable presumption at 20 C.F.R. § 718.304 based on the autopsy evidence.

*Id.* (emphasis added).

Upon review, we conclude that the administrative law judge erred in finding that Dr. Dennis’s report was legally insufficient to support a finding of massive lesions. As an initial matter, the administrative law judge did not set forth the basis for his finding that Dr. Dennis identified lesions that were merely “a mixture of pneumoconiosis and cancer.” Miner’s Claim Decision and Order at 20. Review of the record reflects that Dr. Dennis identified “progressive massive fibrosis,” and on at least two slides described “macular development measuring greater than 1 cm in diameter.”<sup>8</sup> Director’s Exhibit 51 at 3. Moreover, the administrative law judge did not explain how Dr. Dennis’s diagnosis of “comorbidities” suggests that all of “the lesions he identified contained a mixture of pneumoconiosis and cancer,” as opposed to being a diagnosis that the miner had cancerous tumors and progressive massive fibrosis at the same time.<sup>9</sup> For the foregoing reasons, we are unable to conclude that substantial evidence supports the administrative law judge’s characterization of Dr. Dennis’s autopsy opinion pursuant to 20 C.F.R. §718.304(b).

Additionally, to the extent the administrative law judge applied the Board’s unpublished decision in *Gollie*, he applied it incorrectly to reject Dr. Dennis’s opinion.

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<sup>8</sup> The record reflects that for those two slides, labeled “Section A” and “Section D,” Dr. Dennis did not describe any features of cancer. Director’s Exhibit 51 at 3. The slides in which Dr. Dennis described “comorbidities of progressive massive fibrosis” and cancer were those labeled “Section E” and “Section F.” *Id.*

<sup>9</sup> “Comorbidity” is defined as “a comorbid condition,” and “comorbid,” in turn, is defined as “existing simultaneously with and usually independently of another medical condition.” Nat’l Insts. of Health, Medline Plus, Medical Dictionary, <https://www.nlm.nih.gov/medlineplus/mplusdictionary.html> (last visited Feb. 19, 2016).

The physicians' opinions at issue in *Gollie* concluded that the miner's lesions were not actually massive lesions of complicated pneumoconiosis, but were instead a mixture of simple pneumoconiosis and cancer. *Gollie*, BRB No. 07-0375 BLA, slip op. at 4-5. The administrative law judge in that case discredited the opinions of the employer's physicians for relying on "a false premise that lesions must be comprised solely of anthracotic or pneumoconiotic material," and found that a lesion containing as little as 1% pneumoconiosis would still constitute a "massive lesion." *Id.* at 5. Upon review of the employer's appeal, the Board accepted the Director's position that "a chronic dust disease of the lung must produce, by a natural process, large x-ray opacities or lesions to invoke the irrebuttable presumption at 20 C.F.R. §718.304." *Id.* at 6-7. In the Director's view, therefore, a lesion that was "a coincidental fusion of simple pneumoconiosis and some other non-pneumoconiotic material" would not establish the existence of complicated pneumoconiosis, because such a lesion "was not produced by a chronic dust disease." *Id.*

Thus, the Board concluded that the administrative law judge in *Gollie* misinterpreted 20 C.F.R. §718.304 to mean that if a miner has a chronic dust disease of the lung, "any lung lesion that is minimally composed of pneumoconiotic material was yielded by the chronic dust disease." *Gollie*, BRB No. 07-0375 BLA, slip op. at 6. But, *Gollie* did not adopt a standard that any lung lesion diagnosed on autopsy as progressive massive fibrosis must contain nothing but pneumoconiosis in order to qualify as a massive lesion. The Board and the circuit courts have not so held.<sup>10</sup> *See Perry*, 469 F.3d at 363-66, 21 BLR at 2-380-87 (holding that autopsy prosector's testimony that the miner had a six-centimeter mass of progressive massive fibrosis, and a four-centimeter mass that was a mixture of progressive massive fibrosis and cancer, supported invocation of the irrebuttable presumption). Therefore, the administrative law judge erred in finding that Dr. Dennis could not diagnose a "massive lesion" under 20 C.F.R. §718.304(b) unless he described a lesion that was 100% progressive massive fibrosis.

Because the administrative law judge provided no other reasons for finding that Dr. Dennis's autopsy report did not establish massive lesions, we must vacate the administrative law judge's finding that the autopsy evidence failed to establish the

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<sup>10</sup> Additionally, because of the lack of a prevailing standard in the medical community for diagnosing complicated pneumoconiosis on autopsy, the Department of Labor has not promulgated specific standards for diagnosing "massive lesions." *See Pittsburg & Midway Coal Co. [Cornelius]*, 508 F.3d 975, 986-87, 24 BLR 2-72, 2-92 (11th Cir. 2007)(concluding that "the [Department of Labor] has elected to proceed in a common-law fashion, requiring [administrative law judges] to carefully examine the medical evidence presented to determine whether complicated pneumoconiosis exists on the unique facts of each case").

existence of complicated pneumoconiosis, and remand the case for further consideration. On remand, the administrative law judge must determine whether the miner suffered from a chronic dust disease of the lung that yielded massive lesions. *See Gray*, 176 F.3d at 389, 21 BLR at 2-627; *Gollie*, BRB No. 07-0375 BLA, slip op. at 6-7. When weighing the conflicting autopsy reports of Drs. Dennis and Caffrey, the administrative law judge should consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their judgments, and the sophistication of, and bases for, their diagnoses. *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). If the administrative law judge finds that the autopsy evidence supports a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), he must then weigh together the evidence at subsections (a), (b), and (c) and determine whether claimant has invoked the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis. *See Gray*, 176 F.3d at 388-89, 21 BLR at 2-626-29; *Melnick*, 16 BLR at 1-33.

We next consider the administrative law judge's finding that the medical opinion evidence did not establish that the miner suffered from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Before making that finding, the administrative law judge first considered all of the relevant evidence of record, and determined that the miner had "at least a forty pack-year smoking history." Miner's Claim Decision and Order at 5. Substantial evidence supports that finding regarding the miner's smoking history, and it is therefore affirmed.<sup>11</sup>

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<sup>11</sup> The administrative law judge noted the inconsistent evidence in the record, including the miner's deposition testimony in 2004, multiple physicians' reports, treatment records from 2006 and 2009, and claimant's deposition testimony in 2013. The administrative law judge found it "more likely that the [m]iner would have underestimated his smoking history than overestimated it," and relied primarily on three pieces of evidence: the 2004 testimony of the miner, who was born in 1947, that he began smoking a pack per day in his twenties; Dr. Dahhan's note in 2004 that the miner's carboxyhemoglobin level was "indicative of an individual smoking over a pack per day"; and 2009 treatment records indicating that the miner was smoking a pack per day. Director's Exhibit 14 at 3-4; Director's Exhibit 15 at 19; Director's Exhibit 36 at 258; Director's Exhibit 40 at 155; Director's Exhibit 55 at 63; Miner's Claim Decision and Order at 5. The administrative law judge therefore determined that the miner had a smoking history of at least forty pack years. Miner's Claim Decision and Order at 5. The administrative law judge considered all of the evidence regarding the miner's smoking history and adequately explained his conclusion. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The administrative law judge then considered the medical opinions of Drs. Ammisetty and Mettu.<sup>12</sup> Although Dr. Ammisetty opined that coal mine dust exposure was a cause of the miner's bronchial asthma and disabling chronic obstructive pulmonary disease (COPD), the administrative law judge permissibly discredited his opinion because Dr. Ammisetty believed that the miner had a smoking history of only sixteen pack years, which was less than half of the forty pack-year smoking history found by the administrative law judge. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); Director's Exhibit 36 at 12, 14, 25-28; Miner's Claim Decision and Order at 24-25, 27. Dr. Mettu diagnosed the miner with chronic bronchitis and a severe pulmonary impairment, and attributed them to coal mine employment and smoking. Director's Exhibit 12 at 18. The administrative law judge, however, reasonably discredited Dr. Mettu's opinion, because Dr. Mettu relied on an inaccurate smoking history of only six cigarettes per day from 1970 to 2003. *See Trumbo*, 17 BLR at 1-89; Director's Exhibit 12 at 16; Miner's Claim Decision and Order at 22. As substantial evidence supports the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), that finding is affirmed.

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge considered whether the medical opinion evidence established that pneumoconiosis was a substantially contributing cause of the miner's total disability. The administrative law judge considered Dr. Ammisetty's opinion that the miner was totally disabled by "severe COPD . . . secondary to coal dust exposure." Director's Exhibit 36 at 28. The administrative law judge permissibly discounted Dr. Ammisetty's disability causation opinion because Dr. Ammisetty relied on a smoking history that was less than half the forty pack-year history found by the administrative law judge. *See Trumbo*, 17 BLR at 1-89. The administrative law judge found that Dr. Mettu did not provide an opinion regarding the cause of the miner's disability. Miner's Claim Decision and Order at 27. To the contrary, Dr. Mettu concluded that the miner had a severe pulmonary impairment, and attributed it to both the miner's coal mine employment and smoking.<sup>13</sup> Director's Exhibit 12 at 18. However, as was discussed above, the administrative law judge had already permissibly discredited Dr. Mettu's opinion for relying on an inaccurate smoking history. Therefore, the administrative law judge's mischaracterization of Dr. Mettu's

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<sup>12</sup> The administrative law judge also considered, and discounted, the opinions of Drs. Dahhan and Westerfield, that the miner had lung disease due solely to smoking. Director's Exhibits 14, 36; Miner's Claim Decision and Order at 22-25, 28.

<sup>13</sup> Dr. Mettu did not diagnose the miner with clinical pneumoconiosis. Director's Exhibit 12 at 17-18. Thus, his opinion was that the miner was disabled due to legal pneumoconiosis.

opinion as to the cause of the miner's disability was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

Because the administrative law judge permissibly discredited the opinions of Drs. Ammisetty and Mettu, the only opinions supporting a finding of disability causation, we affirm the administrative law judge's finding that claimant failed to establish that pneumoconiosis was a substantially contributing cause of the miner's total disability pursuant to 20 C.F.R. §718.204(c). Consequently, if the administrative law judge, on remand, determines that the evidence does not establish that the miner had complicated pneumoconiosis, he must deny benefits in the miner's claim, because claimant has failed to establish disability causation, an essential element of entitlement. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

### **Employer's Appeal of the Award of Benefits in the Survivor's Claim**

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neely v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, the presumption relating to complicated pneumoconiosis set forth at 20 C.F.R. §718.304 is applicable, or the presumption set forth at 20 C.F.R. §718.305 is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(4).

Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, employer bore the burden to rebut the presumption. To rebut the presumption, employer must establish that the miner had neither clinical nor legal pneumoconiosis, or that "no part" of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2); *see Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

The administrative law judge first found that employer failed to rebut the presumption by disproving the existence of pneumoconiosis. Drs. Dennis and Caffrey both concluded from the miner's autopsy that the miner had clinical pneumoconiosis. Director's Exhibit 51 at 3-4; Director's Exhibit 52 at 5-6. Crediting the autopsy evidence over the x-ray, CT scan, and medical opinion evidence, the administrative law judge found that employer failed to prove that the miner did not have clinical pneumoconiosis. Survivor's Claim Decision and Order at 20-23. The administrative law judge also discredited the opinions of Drs. Westerfield and Caffrey, that the miner did not have legal pneumoconiosis but suffered from COPD and lung cancer due to smoking, because he found that neither physician adequately explained why coal mine dust exposure did not contribute, along with smoking, to the miner's obstructive impairment. *Id.* at 22-23.

Turning to the second method of rebuttal, the administrative law judge found that employer failed to prove that no part of the miner's death was caused by pneumoconiosis. On the miner's death certificate, Dr. Jenigiri listed "metastatic non small cell lung cancer" as the cause of death, and listed no other causes or conditions. Director's Exhibit 50. The administrative law judge gave the certificate little weight, however, because Dr. Jenigiri's qualifications were not in the record, and because "he did not state that no part of the [m]iner's death was caused by coal dust exposure." Survivor's Claim Decision and Order at 24. The administrative law judge also discredited the opinions of Drs. Caffrey and Westerfield that pneumoconiosis did not contribute to the miner's death, which they opined was due solely to metastatic lung cancer caused by smoking. The administrative law judge found Dr. Caffrey's opinion to be conclusory, because "[h]e acknowledged the Miner had clinical pneumoconiosis, but did not explain how it did not hasten the Miner's death." *Id.* at 24-25. Similarly, the administrative law judge found that Dr. Westerfield offered only "a conclusory statement that neither coal dust nor pneumoconiosis caused or contributed" to the miner's death, despite Dr. Westerfield's acknowledgment that the miner had twenty-nine years of coal dust exposure, clinical pneumoconiosis, and a significant lung impairment. *Id.* at 25. The administrative law judge also discredited Dr. Caffrey's opinion on the cause of death, because Dr. Caffrey did not diagnose the miner with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. *Id.*

Employer argues that the administrative law judge erred in finding that employer failed to establish that the miner did not have legal pneumoconiosis, and in finding that employer failed to establish that pneumoconiosis played no part in the miner's death.<sup>14</sup> Employer's Brief (Survivor's Claim) at 4-6. Because rebutting the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis requires employer to establish that the miner had neither clinical nor legal pneumoconiosis, and employer concedes that the miner had clinical pneumoconiosis, we affirm the administrative law judge's finding that employer failed to rebut the presumption by disproving the existence of pneumoconiosis. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(2)(i); *Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 492, 25 BLR 2-633, 2-647 (6th Cir. 2014); Employer's Brief (Survivor's Claim) at 2.

Employer, however, contends that the administrative law judge erred in discrediting the opinions of Drs. Caffrey and Westerfield that the miner did not have legal pneumoconiosis, and relied on that error in discrediting their opinions regarding the

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<sup>14</sup> In its brief, employer states that it preserves for appeal its contention that applying the Section 411(c)(4) presumption to this claim is unconstitutional. Employer's Brief (Survivor's Claim) at 2. Because this argument is not raised for disposition before the Board, we will not address it.

cause of the miner's death. Employer's Brief (Survivor's Claim) at 5. Employer thus argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption by proving that no part of the miner's death was caused by pneumoconiosis. *Id.* We disagree.

Contrary to employer's contention, the administrative law judge did not discredit Dr. Caffrey's and Dr. Westerfield's opinions regarding the cause of the miner's death only because they concluded that the miner did not have legal pneumoconiosis. The administrative law judge also discounted both opinions because he permissibly found that they were conclusory, in that they failed to adequately explain why the miner's clinical pneumoconiosis played no part in his death. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-451 (6th Cir. 2013); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Survivor's Claim Decision and Order at 24. Because the administrative law judge provided a valid reason for discounting the opinions of Drs. Caffrey and Westerfield on whether any part of the miner's death was caused by clinical pneumoconiosis, any error in his discrediting their opinions regarding the existence of legal pneumoconiosis would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of the miner's death was caused by pneumoconiosis, and we affirm the award of survivor's benefits. *See* 20 C.F.R. §718.305(d)(2)(ii).

Accordingly, the administrative law judge's Decision and Order Denying Benefits in a Miner's Claim on Remand is affirmed in part and vacated in part, and that case is remanded to the administrative law judge for further consideration consistent with this opinion. The administrative law judge's Decision and Order Awarding Benefits in a Survivor's Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge